LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 1 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 496

MARIA GORUN AND PARASCHIVA GIURGIU,
on behalf of themselves, and all others similarly situated,
Appellants,

vs.

VICTOR H. FALL and LESTER H. LOBLE, et al.,
Appellees.

On Appeal from the United States District Court for the District of Montana

Motion to Affirm

FORREST H. ANDERSON,
Attorney General of the State of Montana
Capitol Building
Helena, Montana

N. A. ROTERING,
Special Assistant Attorney General
62 West Broadway
Butte, Montana

THURBER'S HELENA

SUBJECT INDEX

MOTION TO AFFIRM 1

STATEMENT OF THE CASE 2

ARGUMENT 2

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Clark v. Allen, 331 U. S. 503 ..... 2, 3, 5

Gaspar's Estate, 128 Mont. 383 275 P. 2d 656 (1954) 6, 7

Ginn's Estate, 136 Mont. 338, 347 P. 2d 467 (1959) 6

Hosova Estate, 143 Mont. 74, 387 P. 2d 305 (1963) 6

Nielsen's Estate, 118 Mont. 304, 165 P. 2d 792 (1945) 6

Olsen v. Spoya, 129 Mont. 83, 282 P. 2d 452 (1955) 6

Zschernig v. Miller, 389 U.S. 429 (1968) 2, 3, 5, 6, 8

STATUTES, RULES AND REGULATIONS

Circular 655, 31 C.F.R. 211.3 7

Montana Rules of Civil Procedure, Rule 44.1 ..... 6, 7, 8

Revised Codes of Montana, 1947 §91-520 ..... 2, 3, 4, 5, 8

28 U. S. C. Section 2281 2

28 U. S. C. Supreme Court Rule 16 1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 496

MARIA GORUN AND PARASCHIVA GIURGIU,
on behalf of themselves, and all others similarly situated,
Appellants,

vs.

VICTOR H. FALL and LESTER H. LOBLE, et al.,
Appellees.

On Appeal from the United States District Court for the District of Montana

Motion to Affirm

The appellees move under Rule 16, Section 1(c) of the Rules of this Court, to affirm the judgment appealed from, on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

This is a direct appeal, taken September 9, 1968, from a judgment of the United States District Court for the District of Montana, entered August 6, 1968, denying plaintiff's (appellants') motion for a sum-

mary judgment, granting defendants' (appellees') motion to dismiss, and dismissing the proceeding.

STATEMENT OF THE CASE

The appellants sought to enjoin the enforcement of Section 91-520, R.C.M., 1947, as amended as being unconstitutional and sought to invoke jurisdiction under Title 28, United States Code, Section 2281.

The appellants are residents of the country of Romania, and the above quoted Montana statute is a reciprocity statute. The appellants are heirs of an estate being probated in Montana and under the above quoted Montana statute, the appellees have taken the position that the appellants must prove reciprocity of inheritance and reciprocity of transfer of funds in the usual manner before they can receive their inheritance.

ARGUMENT

The entire argument of the appellants is predicated on the decision of this Court in Zschernig v. Miller, 389 U. S. 429 and the far-reaching conclusions drawn by appellants from that decision are unwarranted and unreasonable. The decision of the three judge court, herein appealed from, correctly pointed out that *Zschernig* did not overrule Clark v. Allen, 331 U.S. 503. The Clark v. Allen decision sustained the validity of a California reciprocity statute and held that the challenge to the California statute as being an extension of state power in the

field of foreign affairs as "far fetched". The three judge court correctly held that *Zschernig* does not hold all state reciprocity statutes are unconstitutional per se. As a matter of fact, Mr. Justice Douglas, delivering the opinion for the majority of the Court, states at the outset that "We do not accept the invitation to re-examine our ruling in Clark v. Allen", and he further states in the *Zschernig* opinion:

> "We held in Clark v. Allen that a general reciprocity clause did not on its face intrude on the federal domain."

Throughout the majority opinion in Zschernig, we find numerous references to the fact that the Oregon reciprocity statute is unacceptable to the court "in its application" and in its "history and operation."

An examination of the Montana reciprocity statute on its face shows that it does not contain such a stringent requirement as that contained in the Oregon statute whereby the nonresident alien must prove that he can receive the benefit, use and control of his inheritance without confiscation in whole or in part by the government of the country wherein such foreign heir resides. This, we submit, was an element making the Oregon statute repugnant to this Court "in its application" and one which necessarily resulted in the Oregon statute being "inextricably enmeshed in international affairs and matters of foreign policy." We set out at this point the relevant portions of the Montana Reciprocity statute:

"91-520. Conditions under which aliens in foreign country may inherit.

1. No person shall receive money or property, save and except mining property, as provided by section 25, Article III, of the Constitution of the State of Montana, as an heir, devisee and/or legatee of a deceased person leaving an estate or portion thereof in the State of Montana, if such heir, devisee and/or legatee, at the time of the death of said deceased person, is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator, unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country.

2. In order to prove reciprocity the alien heir, devisee and/or legatee must establish by competent evidence produced at a hearing to determine heirship; (a) that such foreign country recognizes the right of United States citizens to inherit property left by a deceased person in such foreign country; (b) that such foreign country places no restrictions upon the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in the United States.

3. If such proof as required by subsection 2 establishes the fact that such foreign country recognizes the right of inheritance, but restricts the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in, and a citizen of the United

States, then and in that event, the court upon such a determination, shall at the time of final distribution, order the inheritance of such alien heir, devisee and/or legatee distributed to the state treasurer of the State of Montana, in trust for such named heir, devisee and/or legatee, under such conditions and restrictions as are imposed on the movement of money or property by such foreign country in question to an heir, devisee and/or legatee residing in, and a citizen of the United States. . . . . ."

The first section of the Montana act was enacted as Chapter 104, Laws of 1939 and the very date of the enactment shows that it was not a move dictated by stress of war nor was it an attempt at confiscation or rettaliation against actual or potential enemies. No statement of urgency accompanied its passage and it did not aim to govern or affect the foreign policy of the United States. As amended, the Montana reciprocity statute is comparable to the California reciprocity statute which received the Constitutional approval of this Court in Clark v. Allen, supra. As this Court did not rule in *Zschernig* that all state reciprocity statutes are unconstitutional per se, we feel that the constitutional issue is answered. Consequently we need deal only with whether the enforcement of the Montana reciprocity law adversely affects the power of the federal government or unduly invades the field of foreign affairs. We contend it does not. In this connection it is most significant that the majority opinion of this Court in *Zschernig*

admits that the Department of Justice in its amicus brief had definitely stated that the federal government does not contend that the application of the Oregon escheat statute unduly interferes with the conduct of foreign affairs. This is likewise true in the case of the Montana statute.

The three judge court below has cited various cases showing that the Montana Supreme Court, in applying the Montana reciprocity statute, has ordered distribution to heirs in the countries of Denmark, (In re Nielsen's Estate, 118 Mont. 304, 165 P. 2d 792; 1945); Yugoslavia, (Olsen v. Spoya, 129 Mont. 83, 282 P. 2d 452; 1955); (In re Estate of Ginn, 136 Mont. 338, 347 P. 2d 467, 1959); Czechoslovakia, (Estate of Hosava, 143 Mont. 74, 387 P. 2d 305; 1963) and to the alien property custodian for Romanian heirs (In re Gaspar's Estate, 128 Mont. 383, 275 P. 2d 656, 1954). The lower court correctly concluded that no irreparable injury can be reasonably claimed by the Romanian heirs here especially in view of these developments.

Another cogent reason for the lower court conclusion was pointed out in the opinion. The lower court cited the Montana Rules of Civil Procedure and a 1966 amendment thereto which is found in Rule 44.1 and by virtue of which questions of foreign law are treated as problems of law and are to be decided by the court as such. The lower court correctly concluded that the Montana Courts, now advised by *Zschernig* (supra)

and equipped with Rule 44.1 of the Montana Rules of Civil Procedure, should be free to apply the Montana escheat statute in a manner not offensive to the Federal constitution.

This leaves but one further point to be commented on. Appellants make much of the fact that Romania has been removed from the Treasury List (Circular 655, 31 C.F.R. 211.3) of countries whose local conditions are such that there was not a reasonable assurance that checks or warrants drawn against funds of the United States could be negotiated for full value by payees in Romania. This regulation concerns government warrants and it should be pointed out that even while Romania was included in that list, still various states distributed inheritances to Romanian citizens. (Gaspar's Estate, 128 Mont. 383, 275 P. 2d 656, 1954). Whether a country is so listed or not has not been the deciding factor as to whether state reciprocity statutes could be applied. Our national government or State Department has never so contended. The simple fact of the matter is that our State Department can at any time guarantee inheritance rights to Romanians by entering into a simple formal treaty with Romania. Why has that not been done many years ago? Simply, because it has been our obvious foreign policy to carry on relations without such a treaty with Romania for reasons best known only to our State Department.

CONCLUSION

It is manifest that all state reciprocity statutes have not been ruled unconstitutional per se. Consequently the questions raised on this appeal are so unsubstantial as not to need further argument. The Motion to Affirm should be granted and the appeal dismissed on the ground that as stated by the three judge court—

> " . . . . the Montana Court now advised by *Zschernig* of the boundaries of the constitutional power of the state, and equipped with Rule 44.1 of the Montana rules, should be free to fashion a procedure for applying R.C.M. 1947, §91-520, in a manner not offensive to the Federal Constitution. . . . . "

Respectfully submitted,

Attorney General for the State of Montana

Special Assistant Attorney General

Counsel for Appellees